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No. 03-1073

In the Supreme Court of the United States

H.C. BAILEY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that a thrift's shareholders, suing derivatively, have no claim against the government if the maximum amount of recovery on behalf of the thrift would be insufficient for the thrift to pay the government's legally prior claims on the thrift's assets.

2. Whether the government's breach of its contract with a thrift constituted a taking of any property rights the thrift's shareholders possessed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 341 F.3d 1342. The opinions of the trial court on the issues of liability and contract remedies (Pet. App. 59a-76a; *id.* at 29a-58a) are reported at 47 Fed. Cl. 2 and 51 Fed. Cl. 265, respectively. The two opinions of the trial court on the issue of just compensation (Pet. App. 25a-28a; *id.* at 11a-24a) are reported at 53 Fed. Cl. 31 and 251.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2003. A petition for rehearing was denied on October 28, 2003 (Pet. App. 77a-78a). The petition for a writ of certiorari was filed on January 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioners own all of the outstanding shares of Security Savings (Security), a savings and loan association formerly chartered by the state of Mississippi. Pet. App. 2a; *id.* at 30a. In 1984 and 1985, Security and its wholly-owned subsidiary, Bailey Mortgage Company,[1] acquired two troubled thrifts. *Id.* at 2a.

In connection with those acquisitions, the Federal Savings and Loan Insurance Corporation (FSLIC) provided Security with approximately $46 million in cash assistance, more than enough to compensate for the negative net worth of the acquired entities. Pet. App. 68a-70a (cash assistance of $39 million and $3.5 million), 73a ($1.442 million plus $2 million). Neither petitioners nor Security contributed any amounts to the acquisition transactions. The courts below held that a contract had been formed between FSLIC and Security in connection with the acquisition, and that, pursuant to that contract, Security was permitted to count approximately $30 million in goodwill and other intangibles as assets for purposes of meeting regulatory capital requirements. *Id.* at 67a-76a; C.A. App. A20,282-A20,286 (Complaint).

When real estate values declined steeply in the late 1980s, a number of the non-traditional thrift investments made by Security declined in value. C.A. App. A30,006-A30,007. Security suffered net losses of $2.4 million in 1988. *Id.* at A20,300. The losses continued to increase in 1989, so much so that, in March 1989, the thrift's examiners concluded that the "asset quality and risk management problems which have had a negative impact on the operations and capital of the institution"

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[1] Security and Bailey are collectively referred to as "Security."

would, "if not corrected, threaten its continued existence." *Id.* at A30,488.

On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which abolished FSLIC and transferred all of its liabilities and assets to the FSLIC Resolution Fund (FRF), which was to be managed by the Federal Deposit Insurance Corporation (FDIC).

FIRREA also precluded thrifts from counting most of their goodwill and certain other intangible assets toward regulatory capital requirements. 12 U.S.C. 1464(t)(2)(C) and (3)(A). Initially, Security was able to blunt the effect of those provisions by obtaining injunctive relief in the United States District Court for the District of Mississippi, which prevented the deduction of intangible assets, including goodwill, from the calculation of Security's regulatory capital. *Security Sav. & Loan Ass'n* v. *Office of Thrift Supervision*, 761 F. Supp. 1277, 1278-1285 (S.D. Miss. 1991). On appeal, however, the United States Court of Appeals for the Fifth Circuit concluded that, even assuming that Security possessed a contractual right to count intangible assets toward regulatory capital requirements, Congress did not exempt any thrift from complying with FIRREA's terms. *Security Sav. & Loan Ass'n* v. *Office of Thrift Supervision*, 960 F.2d 1318, 1322-1323 (5th Cir. 1992). On remand, the district court transferred the case to the United States Court of Federal Claims, which denied Security's renewed request for injunctive relief. *Security Sav. & Loan Ass'n* v. *United States*, 26 Cl. Ct. 1000, 1003-1004 (1992).

In the meantime, the losses that Security had been suffering since well before the enactment of FIRREA continued to mount. Security lost a total of $7.5 million

in 1989, C.A. App. A20,302, prompting the FDIC, the successor to FSLIC, to state, on December 11, 1989, that Security "posed an undue risk to the Savings Association Insurance Fund." *Id.* at A30,492. The losses increased in 1990, *id.* at A20,304, and continued in 1991. *Id.* at A20,306.

Throughout this period before 1992, when Security had maintained, through injunction, the ability to count its intangible assets toward regulatory capital requirements, the thrift's financial condition continued to deteriorate. In October 1991, the FDIC, in its role as deposit insurer, concluded that, even if Security were permitted to count its intangible assets toward capital requirements, the thrift would require a $40 million capital infusion to return to viability. C.A. App. A30,496.

The regulators reiterated that conclusion several months later, in February 1992, explaining that "Security Savings essentially operates at a loss just by 'opening the door.' * * * This institution is not viable, irrespective of the outcome of the court decision on this goodwill, income capital certificates and unamortized cash assistance payments [the intangible assets that Security contended its contracts permitted it to include in the calculation of its regulatory capital]." C.A. App. A30,504.

As a result of Security's steady deterioration, on October 16, 1992, the Office of Thrift Supervision (OTS), the successor to the Federal Home Loan Bank Board, appointed the Resolution Trust Corporation (RTC) as receiver for Security. Pet. App. 2a-3a; *id.* at 32a.

After a series of transactions, the RTC, as receiver, sold Security's assets and deposit liabilities to several independent financial institutions. Pet. App. 3a, 32a-

33a. Because the assets available for sale were not sufficient to cover Security's deposit liabilities, the RTC, in its corporate capacity (RTC-Corporate), also provided the purchasing institutions with approximately $84.3 million in cash so that the assets plus this cash equaled the liabilities assumed by the purchasers. *Ibid.* By arranging for the deposit liabilities to be transferred and by facilitating that transfer with a payment of $84.3 million, RTC-Corporate became subrogated to the claims of Security's depositors against Security in the amount of the $84.3 million payment. *Id.* at 3a.

RTC-Corporate's subrogated claim was reduced over time as Security's remaining assets were sold. Pet. App. 3a, 33a. As of October 31, 2001, the subrogated claim, which represents amounts Security formerly owed to its depositors but had insufficient assets to pay, stood at approximately $66.4 million. *Id.* at 33a. The Security receivership owed other creditors, such as the Internal Revenue Service, smaller amounts. As of December 2000, Security's entire "receivership deficit"—the amount by which the estate's liabilities exceeded its assets—was $71.1 million, including the RTC's $66.4 million claim. *Id.* at 3a, 33a.

By statute, the RTC was terminated on December 31, 1995, and all assets and liabilities held by the RTC were transferred to the FRF. Pet. App. 33a-34a; see 12 U.S.C. 1441a(m)(1) and (2). Accordingly, the FRF, as successor to RTC-Corporate, now holds a $66.4 million claim against Security, representing amounts that were paid by the Government to relieve Security of its excess deposit liabilities. Pet. App. 3a; *id.* at 33a.

2. In 1992, petitioners brought suit in the Court of Federal Claims, alleging that, in applying FIRREA's new capital regulations to Security, the government

had breached contracts with Security that petitioners, as shareholders, were entitled to enforce derivatively. Petitioners also alleged that FIRREA had effected an uncompensated taking of their property interest in Security. Pet. App. 3a. Petitioners' complaint eventually was consolidated with the complaint Security had originally filed in district court in Mississippi, which had been transferred to the Court of Federal Claims. After Security was placed into receivership, the RTC, and later the FDIC, was substituted as a plaintiff in the consolidated case to represent the interests of Security's receivership estate. *Id.* at 30a.

The trial court granted summary judgment both to petitioners and to the FDIC as to contract liability, holding that Security and FSLIC had entered into contracts granting Security the right to count intangible assets toward regulatory capital requirements and that the enactment of FIRREA had breached those contracts. Pet. App. 68a-75a.

The trial court further held that the FDIC could pursue damages on behalf of Security's receivership estate. Pet. App. 75a. In addition, despite the presence of the FDIC in the suit as Security's representative, the court held that petitioners, as shareholders of Security, could also pursue Security's claims derivatively, to protect their rights in any surplus remaining in Security's receivership estate after payment of the estate's liabilities according to the relevant statutory distribution scheme. *Id.* at 65a-66a, 75a.

The court subsequently granted summary judgment to the government with respect to the contract damages theories advanced by petitioners and the FDIC. The primary contract damages theory sponsored by both petitioners and the FDIC involved the assertion that, in the absence of the breach of contract, peti-

tioners would have caused Security to exit the thrift business in order to concentrate on real estate development projects. Under that theory, referred to as the "debanking claim," the FDIC and petitioners sought the difference between the value that the hypothetical real estate development entity allegedly would have possessed at the time of trial and the negative value that the Security receivership currently possesses, *i.e.*, the so-called "receivership deficit." Pet. App. 61a.

The trial court rejected both aspects of the claim. First, the court held that neither petitioners nor the FDIC could recover any damages for the period after which they contend Security would have exited the thrift industry to create a real estate development firm and, thereby, would have relinquished the regulatory capital that was the claimed subject of the contracts. Pet. App. 41a.

Second, the court held that neither petitioners nor the FDIC could recover the "receivership deficit" as an element of damages in any event. As the court explained, rather than damages, the receivership deficit represents liabilities that Security owed, but avoided paying to, its creditors—*i.e.*, its depositors. Pet. App. 38a-41a. The court also held, in the alternative, that since the FRF, as successor to FSLIC's liabilities, would pay any judgment and since the payment would be made to the FRF, as successor to the subrogee of the depositors, Security's claims represented an intragovernmental, non-justiciable dispute. *Id.* at 40a-41a.

The trial court rejected the remainder of the contract damages theories advanced by petitioners and the FDIC for failure to establish a case or controversy. Pet. App. 44a-47a. The trial court also rejected petitioners' claims that there had been a taking and that

they were entitled to just compensation under the Fifth Amendment. *Id.* at 20a-24a.

3. The court of appeals affirmed the rejection of petitioners' contract damages claims and their claim under the Just Compensation Clause. Pet. App. 1a-10a.

a. As the court of appeals explained, the primary claim advanced by the FDIC and petitioners in the trial court was their "debanking" claim for $208.6 million of losses through 1998. Pet. App. 4a. Their theory was that Security would have "exited the thrift business and sold its retail banking deposits and branch offices in 1994" and would then have "established a holding company for direct investments in real estate and financial institutions" that would have had a high value, recoverable as damages, by the time of trial in 1998. *Id.* at 5a. The $208.6 million claim had two components: $68.2 million, which constituted the "receivership deficit" (the amount by which the receivership's liabilities exceeded its assets in 1998), and $140.4 million, which was alleged to be the value of what the "debanked" institution's assets would have been in 1998 absent the breach. *Id.* at 4a.

The court of appeals first rejected the conclusion that the receivership deficit was awardable as damages. As the court explained, that amount was "premised on the false assumption that the receivership deficit is an asset available for recovery by the FDIC for Security Savings." Pet. App. 5a. Rather than an amount of loss caused by the breach, the receivership deficit was simply the amount owed by the thrift, which mostly consisted of amounts "absorbed by the RTC when it paid Security Federal's deposit liabilities." *Ibid.* Second, the court held that the claim for the 1998 asserted value of $140 million had to be rejected, because "the damages award must be assessed as of the

time the bank would have ceded the benefit of the regulatory forbearances." *Id.* at 6a. The court held that, rather than the 1998 figure of $140 million, "the breach of contract damages must be capped at the alleged 1994 figure of $64 million." *Ibid.*

The court then held that the $64 million is also not awardable. The court explained that "the maximum potential award of $64 million" under this theory "is exceeded by the FRF's subrogated claim of $66 million." Pet. App. 6a. It therefore is "a nonjusticiable intragovernmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to another." *Ibid.* Because it could not result in any net benefit to FDIC, the court reasoned, it "does not satisfy the Article III, § 2, case or controversy requirement." *Ibid.*

The court held that the same conclusion follows with respect to petitioners' claim for $44 million, which they had asserted "for the first time" on appeal as "the value of the thrift in 1989." Pet. App. 6a. Even if that amount were awarded instead of the 1994 value asserted by the FDIC, it also "is exceeded by the $66 million" owed to the FRF on its prior claim. See 12 U.S.C. 1821(d)(11)(A). Accordingly, the court rejected petitioners' $44 million claim as well. Pet. App. 6a.

b. The court of appeals also rejected petitioners' claim that FIRREA had effected a taking of their property without just compensation. Pet. App. 7a-9a. Applying long-standing precedent, the court of appeals held that "[i]t is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver." *Id.* at 7a-8a (quoting *Branch* v. *United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995)).

The court of appeals rejected petitioners' argument that the government's breach of contract in enacting

FIRREA constituted a regulatory taking. The court held that petitioners were not parties to the contracts between Security and FSLIC, and that accordingly "this theory of an alleged taking of the contract * * * must be asserted by the FDIC." Pet. App. 8a. The court also held that, although petitioners had "a property interest in any liquidation surplus" of the thrift, the statute "preserves the right of the shareholders to a potential recovery" and therefore "does not take [their] property interest in the surplus or [their] right to pursue the remedy." *Id.* at 9a. The court reiterated that the amount that Security owed its creditors—the receivership deficit—was not an asset of Security. Petitioners were unable to obtain a recovery because "there is no liquidation surplus" that could have been taken. *Ibid.*

ARGUMENT

The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

A. Petitioners' Contract Claim

1. Petitioners contend (Pet. 13-15) that the court of appeals erred in rejecting their claim, first raised on appeal, for $44 million in contract damages.[2] The court

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[2] Contrary to petitioners' contention (Pet. 10 n.3), the court of appeals' conclusion that the $44 million claim for breach-of-contract damages was raised for the first time on appeal was correct. Pet. App. 6a; see *id.* at 37a-54a (trial court's decision reviewing all of the contract damages theories pursued by petitioners and the FDIC). Petitioners cite two documents in which they allege they raised a contract claim for $44 million. The first, "Shareholder Plaintiffs' Opposition to Defendant's Motion for Summary Judgment," alludes to a possible "alternative" restitution claim based

of appeals correctly rejected that claim, because even an award to petitioners, acting on behalf of the estate of the thrift, of the maximum amount of damages that petitioners' damages theory could permit would be insufficient to pay the government its legally prior claims against the estate.

As the court of appeals explained, the "debanking" theory on which petitioners (and the FDIC) relied in the trial court could, if accepted, support a maximum damages award of $64 million. Pet. App. 6a ("[T]he breach of contract damages must be capped at the alleged 1994 figure of $64 million.").[3] The court of appeals correctly held, therefore, that, because "the maximum potential award of $64 million is exceeded by the FRF's subrogated [and legally prior] claim of $66 million," "[n]either Bailey nor any other private creditor could benefit" even if it were established that Security were entitled to that maximum award. *Ibid.*

As the court of appeals recognized, if even an award of $64 million would be insufficient to leave petitioners with anything after the government's legally prior claim for $66 million were paid, it follows *a fortiori* that

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upon the value of Security as of 1989, *id.* at 39a-40a, but does not suggest a $44 million value. Instead, that document merely states that the value of Security is a "disputed fact." *Id.* at 40a. The second document, a "Memorandum In Support Of Shareholder Plaintiffs' Motion For Partial Summary Judgment On Takings Claim," relates solely to petitioners' takings claim. The court of appeals did not suggest that petitioners' takings claim for $44 million was raised for the first time on appeal. The court of appeals rejected petitioners' takings claim on its merits.

[3] The trial court calculated that figure, which "represents the market value of what the FDIC maintains that, but for the breach, Security Savings would have had as of year-end 1994 pursuant to its de-banking strategy ($15.0 million) and the deficit of Security receivership at year-end ($49.1 million)." Pet. App 37a-38a.

an award of the $44 million petitioners claimed for the first time on appeal would similarly leave them with nothing. That is precisely what the court of appeals said in its brief reference to petitioners' late-advanced $44 million claim: that claim "does not help [petitioners] because it also is exceeded by the $66 million." Pet. App. 6a. So long as the government retains its subrogated claim, entitled to priority, for $66 million, no award to the thrift's estate of less than that amount would be sufficient to result in any recovery for petitioners.

Contrary to petitioners' contention (Pet. 13) that "the court of appeals held that Petitioners' claim against the Government was extinguished by the intra-governmental dispute doctrine," the doctrine that the government, as a general matter, may not sue itself has nothing to do with the court's rejection of petitioners' claims. Petitioners' claims on behalf of Security were rejected because they could not have resulted in any surplus to the receivership estate and, consequently, any net award to petitioners. FDIC's claims, which were "intragovernmental," were similarly rejected. See Pet. App. 6a ("The expectation damage claim is * * * a nonjusticiable intragovernmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to the other."). But that rejection too had nothing to do with a rule prohibiting the government as a general matter from suing itself. Rather, as the court of appeals' citation (see *ibid.*) to its decision in *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365, 1382 (2001), indicates, the FDIC's claims were nonjusticiable because the government was a creditor of the receivership estate in an amount greater than any amount the estate could hope to recover from the

government. Any party in that situation would have a nonjusticiable dispute. See *ibid.* (stating that it was "not holding that all claims by the FDIC against the government will fail to satisfy the case-or-controversy requirement," but instead that "where the FDIC has not asserted claims for recovery in excess of what the failed thrift owes to the government, the case-or-controversy requirement is not satisfied").

2. Petitioners do not dispute that the receivership statute legitimately gives the government's subrogated claim priority over their own derivative claim on behalf of Security. They contend, however, that "[t]he court of appeals accepted as true that but for the breach the thrift would have * * * been worth at least $44 million" (Pet. i), and that "this Court must accept as true that an award of contract damages against the United States in an amount calculated to put Security's estate in the position it would have occupied but for the Government's breach would yield a surplus of not less than $44 million payable to Petitioners." Pet. 13.

Those contentions are mistaken. The court of appeals never accepted as true that Security would have had a positive net worth of $44 million but for the breach, and in the current posture of this case, that fact cannot be assumed. Once the Government sought and supported its motion for summary judgment, petitioners bore the burden of "present[ing] affirmative evidence" in order to avoid summary judgment. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Petitioners did present (disputed) evidence that Security had a net worth of $44 million in 1989. But FIRREA had no effect on petitioners at that time and caused them no loss. To the contrary, they were protected by injunction from FIRREA's effects for substantial periods until 1992. See pp. 3-4, *supra*. Meanwhile, the evidence

showed that, during the period between 1989 and 1992, Security's losses from its continued operation (but not caused by FIRREA) mounted, until Security was seized in 1992 and ultimately liquidated at a cost of $66 million. See Pet. App. 3a. Petitioners presented no evidence that that loss (the "receivership deficit"), which was paid by the government, was caused by the government's breach, which consisted in the government's refusal to allow Security to count intangible assets toward regulatory capital requirements.[4] Nor, in light of the injunction that protected Security from the effects of the breach, would any such showing have been likely.

Petitioners contend (Pet. 13) that "[t]he court [of appeals] reasoned * * * that the receivership deficit must be excluded from Security's contractual claim on the ground that the Government cannot recover its own $66 million subrogated claim from itself." The basis for

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[4] The only record evidence demonstrated that Security was losing money prior to the breach, C.A. App. A20,300, A20,302, obtained an injunction to prevent the "breaching provisions" of FIRREA from being applied to it, Pet. App. 61a-62a, and continued to lose tens of millions of dollars after obtaining the injunction, C.A. App. A20,304, A20,306. The unchallenged evidence also demonstrated that, during the pendency of the injunction, the regulatory authorities concluded that Security would need a $40 million capital infusion to return to viability, regardless of whether it was permitted to count its intangible assets toward capital requirements. *Id.* at A30,496. In fact, petitioners' primary contract-based claim before the trial court, the "debanking claim," rested upon the notion that petitioners would cause Security to exit the thrift industry because its operations were incompatible with the "non-breaching" provisions of FIRREA. Pet. App. 5a. Accordingly, on this record, the court of appeals clearly was not required to accept petitioners' current assertion that Security would have been worth $44 million in the absence of the breach.

excluding the receivership deficit from any claim in this case was that the deficit was not a measure of contract damages—*i.e.*, it was not "an asset available for recovery." Pet. App. 5a. Instead, it was simply a measure of the amount by which Security's liabilities—mostly deposit liabilities—exceeded its assets. Although petitioners now contend (Pet. 15) that the receivership deficit was "foreseeable consequential damage that Security's receivership estate would not have incurred but for the breach," there was in fact no evidence that that amount was lost as a result of the government's breach of contract, rather than as a result of the consistent losses that Security's operations had caused. For that reason, the receivership deficit was not awardable as expectation damages.

For the foregoing reasons, as the court of appeals held, that loss both (a) does not form any part of the damages recoverable by petitioners on behalf of Security, see Pet. App. 5a (noting the "false assumption that the receivership deficit is an asset available for recovery by the FDIC for Security Savings"), and (b) is recoverable by the government pursuant to its prior claim on Security's estate, see *id.* at 3a (noting government's "subrogated claim" of approximately $66 million), 6a (same).

3. Petitioners contend (Pet. 16) that the judgment of the court of appeals "eviscerates" this Court's holding in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), that, "[w]hen the United States enters into contract[ual] relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at 895 (quoting *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)). In fact, as noted above, the court of appeals adhered to that

principle and did not rely upon any rules peculiar to the government in rejecting petitioners' claim.

Petitioners also contend (Pet. 16-17) that a hypothetical example drawn from the Glendale transaction before the Court in *Winstar* supports their claim for contract damages. *Winstar* itself did not involve any damages analysis. See *Winstar*, 518 U.S. at 860 ("We decide whether the Government may assert four special defenses to respondent's claims for breach."). In any event, petitioners' calculation with regard to Glendale is mistaken.

Petitioners assume (Pet. 16-17) that Glendale, which possessed a book-value net worth of $277 million, acquired a thrift with net liabilities of $734 million. They further assume that, the very next day, as a result of the government's breach of contract regarding the calculation of regulatory capital, Glendale was placed in receivership. Petitioners contend that the decision in this case would have prevented Glendale from recovering its pre-acquisition book value of $277 million.

Nothing in the decision of the court of appeals in this case dictates the conclusion petitioners suggest in their hypothetical. Unlike in the hypothetical, Security did not purchase institutions with substantial net liabilities, nor did petitioners infuse any capital into the acquired institutions. At the time of the transactions at issue in this case, FSLIC paid Security an amount equal to the negative net worth of the thrifts Security acquired. Moreover, in the ensuing years, Security operated at a substantial deficit without regard to the provisions of FIRREA that caused a breach of contract.

Accordingly, whereas in the Glendale hypothetical the "receivership deficit" may well be traceable to the deficit in the purchased institutions, the receivership

deficit in this case was not traceable to any deficiency in capital in the acquired institutions.

4. Finally, petitioners contend (Pet. 19) that the court's decision is part of "a consistent body of post-*Winstar* Federal Circuit jurisprudence that has repeatedly denied plaintiffs any meaningful damages." Petitioners are incorrect. In each *Winstar*-related case, the Federal Circuit, as it did here, has identified the applicable law and applied it to the facts of the case to determine whether the trial court's decision regarding damages was correct. In the process, the Federal Circuit has affirmed the award of tens of millions of dollars of damages to plaintiffs in *Winstar*-related cases, including cases in which the thrift had been placed into receivership. See, *e.g.*, *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365 (Fed. Cir. 2001) (affirming the award of $21.5 million to the acquirer of a failed thrift); *Bank United* v. *United States*, 80 Fed. Appx. 663 (Fed. Cir. 2003). Cf. *LaSalle Talman Bank* v. *United States*, 317 F.3d 1363, 1370-1375 (Fed. Cir. 2003) (reversing trial court's decision denying lost profits); *Bluebonnet Sav. Bank* v. *United States*, 266 F.3d 1348 (Fed. Cir. 2001) (reversing finding of zero damages); *California Fed. Bank* v. *United States*, 245 F.3d 1342, 1349-1352 (Fed. Cir. 2001) (reversing summary judgment as to lost profits claim).

B. Petitioners' Takings Claim

Petitioners contend (Pet. 20-30) that the court of appeals erred in rejecting their claim under the Just Compensation Clause. The court of appeals correctly held that there was no taking of the thrift institution itself, because the placement of the thrift into receivership under the regulatory scheme was not a taking. Pet. App. 7a-9a. The court also correctly held that

there was no taking of the thrift's contracts with the regulatory agency, because the contracts created only an expectation of performance or, in the event of breach, contract damages. *Id.* at 8a-9a. Finally, the court correctly held that there was no taking of petitioners' interest in a liquidation surplus, because petitioners' interest in a surplus—had one been generated —was at all times protected by the thrift receivership distribution statute, 12 U.S.C. 1821(d)(11). See Pet. App. 9a.

1. Petitioners contend that the court of appeals held that "the Government's seizure of a regulated financial institution may not, under any circumstances, constitute a taking of property under the Fifth Amendment." Pet. 20. Petitioners do not and cannot refer to any portion of the court of appeals decision to support that contention, because the court did not so hold. Instead, the court held that "it is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver." Pet. App. 7a-8a. The question whether a taking occurs depends on "the cause of the insolvency." *Id.* at 8a. In this case, the court of appeals held that the cause of the insolvency was not sufficient to constitute a per se taking. *Ibid.* That is not a holding that the seizure of a bank could never constitute a taking of property.

2. Petitioners contend (Pet. 23) that Security's contract with FSLIC gave rise to a reasonable investment-backed expectation "that the Government would not seize their thrift based solely upon regulatory noncompliance that was directly caused by the Government's breach of its regulatory capital contract." The court of appeals correctly rejected that contention because petitioners were not parties to Security's contracts and because, in any event, petitioners, "through the FDIC,

w[ere] not deprived of a contractual remedy for the government's breach." Pet. App. 8a. As this Court held in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 n.27 (1949), the right of a non-breaching party to a contract with the government to seek contract damages for the government's breach of contract forecloses a claim that the government's breach constituted a taking. Cf. *Lujan* v. *G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, * * * it is an interest * * * that can be fully protected by an ordinary breach-of-contract suit.").

3. Petitioners contend (Pet. 27) that their property interest was taken by virtue of the fact that the "contract damages action [was] itself controlled *by the Government.*" Petitioners are incorrect. The United States did not control the contract claim of either the FDIC or of petitioners. In fact, the government requested, unsuccessfully, that the FDIC's claims be dismissed in this case because the FDIC's predecessor, the RTC in its corporate capacity, *i.e.*, the government, had purchased the thrift's claim from Security's receivership. See Pet. App. 66a-67a. Moreover, the court of appeals expressly found that the FDIC "avidly pursued contract damages on behalf of Security Savings." *Id.* at 9a. Finally, the FDIC was not alone in pressing the thrift's breach of contract claim. Rather, the trial court established a procedure, contrary to the law governing derivative actions, through which petitioners also were permitted to "pursue the claims on behalf of the failed thrift," *id.* at 75a, to protect their interest in any liquidation surplus. *Id.* at 66a. Accordingly, the government did not control the breach of contract claims in this case.

4. Petitioners contend (Pet. 23-26) that the decision of the court of appeals is inconsistent with *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), or *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). Petitioners are mistaken.

Neither *Monsanto* nor *Kaiser Aetna* involved a contract between a private party and the government. *Monsanto* involved the government's appropriation and destruction of private property—trade secrets—entrusted to the government, and *Kaiser Aetna* involved a federal requirement that a private entity may not exclude the public from real property it owned. Although in each case the government had made a commitment of some sort that was relevant in assessing whether the property owner had an investment-backed expectation, neither case involved a contract, and the Court had no occasion to—and did not—in either case address any question regarding contract law or the availability of a remedy under the Just Compensation Clause for the government's breach of a contract.

5. Petitioners contend (Pet. 27-28) that the court of appeals erred in failing to hold that the government's breach of the thrift's contracts, in combination with the applicable receivership distribution statute, effected a taking of their interest in the thrift's "liquidation surplus." That contention is also incorrect.

The court of appeals held that, pursuant to the applicable thrift receivership distribution statute, 12 U.S.C. 1821(d)(11)(v), petitioners possessed a property interest in any surplus generated by Security's liquidation. Pet App. 9a. The court also recognized, however, that petitioners' property interest was contingent upon the liquidation actually generating a surplus. *Ibid.* Security's liquidation did not and could not generate a surplus, because the Security receivership currently

possesses a deficit, representing amounts it has failed to pay its creditors, and that deficit exceeds any potential recovery for breach of its contracts.[5] *Id.* at 4a-6a. The court correctly held that there could be no compensable taking of a non-existent surplus. *Id.* at 9a.[6]

6. Finally, petitioners mistakenly contend (Pet. 29-30) that the decision of the court of appeals conflicts with *Armstrong* v. *United States*, 364 U.S. 40 (1960). In *Armstrong*, the petitioners possessed liens as materialmen under state law on boats that a contractor was constructing for the government. When the contractor defaulted, the government took title to the boats which, due to the doctrine of sovereign immunity, had the effect of destroying the liens. This Court held that the destruction of the liens constituted a taking of the value of the liens.

Petitioners assert (Pet. 29) that, here, "[a]s in *Armstrong*, the Government applied, 'for its own advantage,' the special rule arising from the Federal Circuit's understanding of Article III and the priority statute to

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[5] This would be true regardless of the identity of the creditors, whether private parties or the government insurer as subrogee of Security's depositors.

[6] Petitioners attempt (Pet. 28) to analogize this case to one in which a hypothetical statute required that "damages shall be reduced in an amount equal to the net liquidation costs and any other expenses incurred by the United States in connection with any receivership of a thrift institution seized as a result of the [government's] breach of contract." The analogy is inapt because the court did not reduce the damages in this case by the liquidation costs of the thrifts. Instead, it held that the "surplus" petitioners claim would never have materialized, because more senior creditors (in this case, largely advancing the FRF's claims on behalf of depositors) would swallow up any recovery.

pay the losses it inflicted on itself rather than those it inflicted on Petitioners." The premise of petitioners' argument is incorrect. As explained above, see pp. 12-13, *supra*, the court of appeals did not apply any "special rule" arising from "Article III and the priority statute" in this case. Instead, the court, in its brief discussion of petitioners' newly asserted $44 million claim, simply applied the settled priority rules to find that no surplus that petitioners could recover would be left after other creditors of the Security estate obtained the recoveries to which they were entitled. Pet. App. 9a.

Moreover, in reaching its decision in *Armstrong*, the Court emphasized that the liens at issue were not the subject of any "contractual arrangements." 364 U.S. at 46. *Armstrong* does not support petitioners' position here, where the relations between the thrift and the government were the subject of contractual arrangements, and both the FDIC and petitioners remained free to pursue the thrift's contractual rights and remedies. Pet. App. 8a-9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.